

Criminal Law and Practice Team
Scottish Government
GW.14
St Andrews House
Edinburgh
EH1 3DG

By email domesticabuseconsultation@gov.scot

26 March 2019

Dear Sir/ Madam,

Consultation on Protective Orders for People at Risk of Domestic Abuse

1. The Information Commissioner's Office (ICO) is pleased to respond to the Scottish Government's consultation on Protective Orders for People at Risk of Domestic Abuse.
2. The ICO has responsibility for, amongst other things, promoting and enforcing the EU General Data Protection Regulation (GDPR) and the UK Data Protection Act 2018 (DPA 2018).
3. The ICO is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The ICO does this by providing guidance to individuals and organisations, solving problems where we can, and taking appropriate action where the law is broken.
4. Data protection legislation protects individuals' personal data rights. When personal data is lost, stolen or shared or used inappropriately it can lead to harm, distress and negative impacts on personal rights and freedoms. It is vital therefore that strong personal data protection policies and procedures are a central pillar in any approach to protecting victims of domestic abuse. This ensures that the risk of additional harms or distress to vulnerable individuals and families relating to inappropriate processing of personal data is minimised.
5. It is also important to note that suspected perpetrators also have the right to have their personal data rights protected.
6. While the ICO cannot comment on policy to tackle domestic abuse we can support the Government and the proposed data controllers to consider the impact of legislative proposals on individuals data protection rights, how risks to

rights and freedoms can be minimised and ultimately, how data protection legislation can be complied with.

7. We set out below some key sections of data protection legislation that the Scottish Government should have regard in developing these proposals.

Consultation with the ICO

8. Article 36(4) of the GDPR requires the Scottish Government to consult with the ICO when developing proposals for legislation to be passed by the Scottish Parliament, or regulatory measures based on such legislation, relating to the processing of personal data. This includes:
 - i. primary and secondary legislation;
 - ii. regulatory measures (such as regulations, directions and orders) made under primary or secondary legislation;
 - iii. statutory codes of practice; and
 - iv. statutory guidance.
9. In addition Article 28(2) of the Law Enforcement Directive states that:

"Member States shall provide for the supervisory authority [in the case of Scotland, the ICO] to be consulted during the preparation of a proposal for a legislative measure to be adopted by a national parliament or of a regulatory measure based on such a legislative measure, which relates to processing."
10. Although the above requirement was not transcribed into the DPA 2018 we recommend that, in the spirit of the Law Enforcement Directive the Scottish Government take the opportunity to consult with us on the development of this legislation.
11. Any consultation with the ICO should be separate from any general public consultation and should be undertaken during the formative stages of the development of policy, to ensure that there is the opportunity to give due consideration to input from the ICO before the outputs are finalised.

Privacy by Design

12. Section 57 of the DPA 2018 sets out the requirement that data controllers implement data protection by design and default. This means considering privacy and data protection issues at the "time of the determination of the means of processing the data and at the time of the processing itself".

Data Protection Impact Assessment

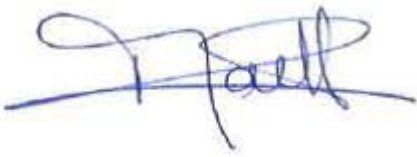
13. In circumstances where proposed processing is likely to result in a serious risk to the rights and freedoms of individuals the DPA 2018 requires the data controller to carry out a Data Protection Impact Assessment (Section 64, DPA, 2018).
14. The processing of personal data in relation to protective orders will result in significant infringements of the suspected perpetrator's European Convention on Human Rights, Article 8 rights whilst the order is in force. Infringements could continue after the order has expired depending on record retention policies and who has access to information relating to the order.
15. A DPIA allows for systematic consideration of the proposed processing. The purpose, the lawful basis, what information it is necessary to collect and process, the likely impact on the rights and freedoms of individuals involved, whether any infringements on rights are necessary and proportionate, how individuals can access their data protection rights and finally how risks can be managed and mitigated.
16. Completing a DPIA will help the Scottish Government prepare a comprehensive impact assessment of the policy proposals and put forward a bill containing proposals designed to minimise risks to the rights and freedoms of individuals.
17. Our recommendation therefore, is that the Scottish Government carry out a DPIA as part of the legislative development process.

Question 14: views on whether there should be a statutory duty on the police, when making an application to the courts, or putting in place protective measures, to refer a person at risk to support services

18. A statutory duty would provide the police with a clear legal gateway for sharing information with support services however it may not be necessary or appropriate for a referral to take place in every case indeed it may be counter-productive if it goes against the victims' wishes.
19. In determining how best to ensure that those that would benefit from specialist support receive that support the Scottish Government may wish to review existing referral mechanisms and provisions under the DPA 2018 or elsewhere to determine whether these currently provide a robust, lawful basis for information sharing where it is appropriate.
20. If existing routes are not sufficient the Scottish Government may wish to consider introducing a statutory duty that could be applied on a case by case basis to avoid counterproductive blanket referrals.

21. The ICO will publish a revised data sharing code of practice in 2019 which may be of assistance.
22. We trust this response is helpful and we look forward to the Scottish Government undertaking detailed consultation with us as its proposals develop. Should the Scottish Government require clarification of any of the points made, please contact us on 0303 123 1115 or by email at scotland@ico.org.uk.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Maureen H Falconer', with a stylized flourish at the end.

Maureen H Falconer
Regional Manager – Scotland